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In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIP E. GUTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE

Solicitor General

STEPHEN S. TROTT

Assistant Attorney General

SARA CRISCITELLI

Attorney

Department of Justice

Washington, D.C. 20530

(202) 633-2217

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QUESTION PRESENTED

Whether the district court abused its discretion in refusing a competency hearing or additional psychiatric evaluation of a government witness, a depressive whose psychiatric evaluation reports and attending psychiatrists were made available to the defense at trial.



TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases :

<i>United States v. Banks</i> , 520 F.2d 627	8-9
<i>United States v. Benn</i> , 476 F.2d 1127	5, 9
<i>United States v. Crosby</i> , 462 F.2d 1201	9
<i>United States v. Gerry</i> , 515 F.2d 130, cert. denied, 423 U.S. 832	5
<i>United States v. Heinlein</i> , 490 F.2d 725	5
<i>United States v. Hyson</i> , 721 F.2d 856	5
<i>United States v. Killian</i> , 524 F.2d 1268, cert. de- nied, 425 U.S. 935	9
<i>United States v. Lightly</i> , 677 F.2d 1027	9
<i>United States v. Martino</i> , 648 F.2d 367, cert. de- nied, 456 U.S. 943	7
<i>United States v. Provenzano</i> , 688 F.2d 194, cert. denied, 459 U.S. 1071	7
<i>United States v. Raineri</i> , 670 F.2d 702, cert. denied, 459 U.S. 1035	5
<i>United States v. Riley</i> , 657 F.2d 1377, after re- mand, 684 F.2d 542, cert. denied, 459 U.S. 1111..	6, 7
<i>United States v. Womack</i> , 542 F.2d 1047	9

Statutes and rules :

18 U.S.C. 371	2
18 U.S.C. 1510	2
18 U.S.C. 1951	2
Federal R. Evid. :	
Rule 402	5
Rule 601	4

IV

Statutes and rules—Continued: Page

Rule 603	5
Rule 605	5
Rule 606	5

Miscellaneous:

3 Weinstein & Berger, <i>Weinstein's Evidence</i> (1982)	5
2 Wigmore, <i>Evidence</i> (Chadbourn rev. ed. 1979) ..	5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 725 F.2d at 417.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1984. A petition for rehearing was denied on May 9, 1984 (Pet. App. A42). The petition for a writ of certiorari was filed on June 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Indiana, petitioner

was convicted of conspiracy and extortion, in violation of 18 U.S.C. 371 and 1951, and was sentenced to concurrent terms of three years' imprisonment and a \$10,000 fine. A divided court of appeals affirmed (Pet. App. A1-A39).

1. The pertinent facts are stated in the opinion of the court of appeals (Pet. App. A1-A3, A6). Petitioner was President Pro Tem of the Indiana State Senate in the early and mid 1970's. The evidence at trial established that between 1973 and 1976 petitioner, Majority Caucus Chairman Martin Edwards, and Majority Leader James A. Gardner received monthly payments totalling approximately \$1,000 a month from the Indiana Railroad Association, a lobbying organization.¹ Petitioner told the FBI that the payments constituted legal fees, but neither petitioner's nor Edwards' law partners knew of the alleged payments of legal fees. In fact, as the government proved, petitioner deposited the funds into his personal account, and from there transferred the money into his wife's business account. Tr. 374-387, 1073-1080; GXs 1, 5, 6. The government's evidence also established that the Railroad Association's payments were made to advance legislation that would repeal Indiana's "full crew" railroad law.

Prior to trial, Howard Odom, the Executive Director of the Indiana Railroad Association, pleaded guilty to a charge of obstructing a criminal investigation, in violation of 18 U.S.C. 1510. He testified for the government at petitioner's trial. According to Odom's testimony, petitioner told him that the railroads had not treated Edwards right over the full

¹ Gardner died before trial and Edwards pleaded guilty to the extortion and conspiracy charges on the first day of trial.

crew law and that Odom should discuss the matter with Gardner. Odom met with Gardner, and they agreed to the monthly \$1,000 payments. Subsequently, Odom explained to his secretary that petitioner's name was not to appear on the Railroad Association checks or check stubs (Tr. 585). After an audit in 1976, Odom told the association's board of directors that the checks represented payment of legal fees to Edwards (Tr. 725-791; GX 19).

On a separate occasion petitioner billed Odom and the Indiana Railroad Association \$40,000 for other legislation the Association was interested in. Petitioner told Odom that they would split the payment four ways, giving Odom a one-quarter share; the association wrote a check to petitioner for the full sum, and Odom received a \$10,000 check from petitioner. Tr. 883-884; GX 5.

2. In 1944 Odom had received a medical discharge from the United States Army for "psychoneurosis." Apparently as a result of stress occasioned by the government's investigation of the association's payments to petitioner and his co-defendants, Odom began to exhibit nervous symptoms in late 1980, and he was hospitalized in January 1981 for depression. He was discharged the next month on a regimen of medication, but was rehospitalized in March after he tried to strangle his wife.

In the course of these two periods of hospitalization, Odom was examined by and placed under the care of a psychologist and psychiatrists. One of his doctors reported that, although Odom was depressed and irritable, there was "[n]o significant evidence * * * of a major breakdown in reality testing [or] judgment, * * * and his capacity for ordinary conventional thinking is unimpaired" (Tr. 847). While

Odom was still a defendant, however, the doctor told Odom's lawyer that "you will have considerable difficulty in getting him to relate openly and satisfactorily in order to assist you in his own defense" (Tr. 856; see also Pet. App. A3).

Prior to trial, petitioner sought a competency hearing and the appointment of a psychiatrist to examine Odom, then his co-defendant. The court declined to order the evaluation. After Odom pleaded guilty, however, he waived his privilege as to his medical information and the government furnished petitioner with copies of Odom's medical reports. These reports were introduced in evidence at trial (Tr. 837-856). Despite Odom's waiver of his privileges, petitioner did not call any of the psychiatrists or psychologists familiar with Odom's condition to testify.

ARGUMENT

Petitioner contends (Pet. 7-14) that the district court abused its discretion in denying a competency hearing and pretrial psychiatric evaluation of witness Howard Odom. He also contends that the district court's failure to strike Odom's entire testimony because it was allegedly "confused, inconsistent and incoherent" (Pet. 13) requires reversal. The court of appeals correctly concluded that the district court exercised its broad discretion in a permissible manner by denying the motion for a competency hearing and psychiatric evaluation. No further review is warranted.

1a. Under Rule 601 of the Federal Rules of Evidence, "[e]very person is competent to be a witness * * *." The rule reflects the current view that the only bar to a witness's ability to testify—apart from disabilities specifically prescribed by the Rules, such

as refusal to take an oath (Rule 603), or a conflicting role in the proceeding as judge or member of the jury (Rule 605, 606)—is his failure to satisfy a minimum credibility requirement. See 3 Weinstein & Berger, *Weinstein's Evidence* § 601[01], at 601-10 (1982); *id.* at § 601[03] at 601-27; 2 Wigmore, *Evidence* § 501, at 709 (Chadbourn rev. ed. 1979). Moreover, the rules favor admission of all relevant evidence (Rule 402). Disqualification of a witness because of a history of mental illness is not favored. Instead, "the question of competency goes to the issue of credibility, which is for the trier of fact." *United States v. Hyson*, 721 F.2d 856, 864 (1st Cir. 1983); see also *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1972).

Where the competency of a witness is questioned, there is no requirement that a court hold a hearing. It is within the district court's discretion to determine whether an inquiry into competency is called for and to determine the form that any inquiry should take. *United States v. Gerry*, 515 F.2d 130, 137 (2d Cir.), cert. denied, 423 U.S. 832 (1975). Similarly, because of the infringement of a witness's privacy entailed in such an inquiry, the potential for use as a tool of harassment, and the likelihood that witnesses would be deterred from coming forward, psychiatric examinations of witnesses should be ordered only sparingly, upon a clear indication that the ability of a witness to testify truthfully is doubtful. *United States v. Raineri*, 670 F.2d 702, 709 (7th Cir.), cert. denied, 459 U.S. 1035 (1982); *United States v. Heinlein*, 490 F.2d 725, 729-732 (D.C. Cir. 1973).

b. In the circumstances of this case, the district court did not abuse its discretion in declining to or-

der a psychiatric exam or to hold a preliminary competency hearing. Until the eve of trial Odom was a defendant in the instant case. The court was accordingly in a position to observe him and evaluate his mental status. Significantly, neither Odom nor his counsel ever challenged his competency to stand trial or sought a competency evaluation.

Petitioner's request for a competency evaluation of Odom was initially predicated solely upon the undisputed fact that Odom had received psychiatric treatment and petitioner's affidavit that Odom had argued with his wife, had an odor of alcohol on his breath, and had, in petitioner's view, undergone a "distinct personality change" (R. 157-158). After Odom had pleaded guilty based on an agreement with the government that called for his testimony at trial, he released seven psychiatric reports from attending doctors who had treated him on an inpatient and outpatient basis for depression (Tr. 837-856; GX 73). Although the reports were placed in evidence and provided the basis for cross-examination of Odom and for defense arguments to the jury, petitioner did not point out anything in those reports that called in question Odom's ability to testify truthfully or to recall pertinent events accurately. Thus, the court of appeals properly determined that the district judge was "entitled to conclude that the reports taken as a whole did not suggest that Odom was incapable of telling the truth or of appreciating the significance of his oath" (Pet. App. A3). See also *United States v. Riley*, 657 F.2d 1377, 1387 (8th Cir. 1981), after remand, 684 F.2d 542 (1982), cert. denied, 459 U.S. 1111 (1983).

c. Nor was the district court's refusal to strike Odom's testimony an abuse of discretion. The dis-

trict court was plainly in the best position to evaluate the coherence and indicia of reliability of Odom's testimony, having heard the direct examination and cross-examination in their entirety and having observed the witness's demeanor throughout. The district court declined to "strike the entire testimony * * * as being totally worthless as a matter of law" (Tr. 932) because it found that the testimony was not "completely without some credibility," observing that the jury is the final arbiter of credibility in such circumstances (Tr. 938). If, as petitioner suggests (Pet. 5), Odom's testimony was on its face "incoherent and incomprehensible," there is no reason to think that these qualities would have escaped the jury. See *United States v. Provenzano*, 688 F.2d 194, 203-204 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); *United States v. Riley*, 657 F.2d at 1387; *United States v. Martino*, 648 F.2d 367, 384-385 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982). In any event, there is no occasion for this Court to review the court of appeals' fact-bound determination that Odom's testimony, taken as a whole, did not display "any abnormal degree of internal inconsistency, bearing in mind that Odom was in the uncomfortable position of testifying to illegal conduct to which he had been a party" (Pet. App. A5).

To the extent that any circumstances suggesting unreliability in Odom's testimony were less than patent, the jury was still fully alerted to the need to examine his testimony with special care. The psychiatric reports on Odom were read to the jury verbatim. Moreover, petitioner cross-examined Odom concerning his psychiatric history and emphasized that history in arguing to the jury. Pet. App. A11;

Tr. 899-900, 911-913.² In short, there is no reason to believe that the jury was incapable of assessing Odom's testimony in a reliable fashion. There was accordingly no justification for barring the jury from considering that testimony.

2. Petitioner does not suggest that the decision of the court below conflicts with any decision of any other court of appeals.³ Indeed, petitioner's claim is simply that the lower courts lack authoritative guidelines to direct their exercise of what petitioner concedes to be a broad discretion concerning the procedures to be followed when the mental status of a witness has been called in question (see Pet. 9, 10-11, 13-14). Petitioner has not offered any reason to think that the courts of appeals are incapable of providing any needed guidance.

Cases cited by petitioner (Pet. 8-9, 11-12) do not require a contrary result in this case. In *United States v. Banks*, 520 F.2d 627, 630 (7th Cir. 1975), the court of appeals recognized that a district court's finding of admissibility should not be overturned where a witness testified extensively at trial and the district court had ample opportunity to assess his competency. The district court in the instant case

² The claim that further development of the evidence pertaining to Odom's mental status might have assisted the jury in assessing Odom's testimony must be assessed in light of petitioner's election not to present the testimony of the psychologist and psychiatrists who examined Odom.

³ Similarly, the disagreement between the majority and the dissenting judge in the court of appeals does not concern the standards to be applied in cases such as this, but only their application to the record of this particular case. See, e.g., Pet. App. A21, A23-A25 (Coffey, J., dissenting).

explicitly evaluated Odom's capacity in light of his trial testimony. The result below is thus entirely consistent with *Banks*. See also *United States v. Killian*, 524 F.2d 1268, 1275 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976).

United States v. Lightly, 677 F.2d 1027 (4th Cir. 1982), also reaffirms that the law presumes competency. There the court of appeals reversed a conviction where the district court *excluded* a defense witness without a preliminary examination even though the witness's doctors had certified his competency. *Lightly* recognizes that the court's discretion to exclude relevant evidence is limited; it therefore does not support petitioner's argument that exclusion was required here. See also *United States v. Womack*, 542 F.2d 1047, 1051-1052 (9th Cir. 1976).

The facts of *United States v. Crosby*, 462 F.2d 1201 (D.C. Cir. 1972), contrast markedly with those presented here. In *Crosby*, serious questions were raised concerning the competency of a witness who, as a long-time drug addict, had been hospitalized for his addiction, and who had used drugs on the day he testified. The court of appeals found that the trial court abused its discretion in failing to consult readily available hospital records bearing on the witness's competency. Here, however, such records were considered and were presented for the jury's consideration. Finally, *United States v. Benn, supra*, recognizes the district court's broad discretion in determining competency as a threshold question. *Benn* holds that this discretion was not abused where the witness's trial testimony demonstrated her capacity and her understanding of the obligation to tell the truth.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

STEPHEN S. TROTT

Assistant Attorney General

SARA CRISCITELLI

Attorney

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